No. 07-1536

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In The
Supreme Court of the United States

DERRICK TODD LEE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Defendant Derrick Todd Lee was charged by indictment on June 25, 2003, with the May 31, 2002, first degree murder of Charlotte Murray Pace, a violation of La. R.S. 14:30. (Vol. I R. p. 98.) On July 2, 2003, defendant, represented by counsel, waived formal arraignment and entered his own plea of not guilty as charged.

Defendant filed many pretrial motions, and extensive hearings on those motions were held. Pretrial motions filed by the defense included the following: Motion to Transfer, various funding motions, Motion to Preserve Evidence and Portions of Substances for Independent Testing, *Simpson* Motion to Recuse the Trial Court, Motion for Production of Initial Offense Report, Motion for Discovery of Information Needed for Fair Trial, Motion to Discovery and Disclose Evidence Favorable to Defense, Motion for Change of Venue on Basis of Pretrial Publicity, Motion for Bill of Particulars, Motion for Notice of Intent to Introduce "Victim Impact" Evidence and to Limit "Victim Impact" Evidence, Motion for Production of Records of Arrests and Convictions and NCIC Reports and for Production of a List of Potential Witnesses to be Called by the State, Motion for DNA Testing Discovery, Notice of Intention to File Other Motions, and Motion to Suppress Statements. The state filed discovery motions, Notices of Intent and Request for Hearings to Introduce Other Crimes Evidence in Accordance with L.C.E. art. 404(B) and *State v. Jackson*, and Motion to Require Defense

Counsel to Certify Qualification to Represent Defendant in Capital Case.

Defendant's trial began on September 13, 2004, with voir dire, which took place on September 13, 14, 15, 17, 20, 21, 22, 23, 24, 27, 28, 29, and 30, 2004. The jury was sworn as a panel on Monday, October 4, 2004, after which time the trial court gave preliminary instructions, the indictment and minute entry of the arraignment was read, opening statements by both sides were made, and testimony began. The state rested its case-in-chief on October 11, 2004. The defense presented no evidence and rested on that same date. Closing arguments, the trial court's instructions, and deliberations on the guilt phase took place on October 12, 2004. The jury deliberated from 2:47 p.m. to 3:30 p.m., when they returned to the courtroom with requests. The jury resumed deliberations at 3:33 p.m. and returned with a unanimous verdict of guilty of first degree murder as charged at 4:16 p.m.

The penalty phase of trial took place on October 13, and 14, 2004. During this phase, the state called three witnesses for its case-in-chief: Casey Pace, Sam Pace, and Ann Pace. The defense at the penalty phase called seven witnesses to testify: Jesse Perkins, Mike Thornhill, Dorothy Temple, Nancy Dreher, Tarshia Fontenot, Dr. Drew Gouvier (an expert neuropsychologist), and Dr. Sarah Deland (an expert forensic psychiatrist). On rebuttal, the state called Patrick Lawless, Gary Robillard, Dr. Donald Hoppe (an expert clinical psychologist), and Dr. Robert Blanche

(an expert state certified psychiatrist). The jury deliberated one hour and thirty-three minutes before returning a verdict of death in this case. (Vol. I R. p. 93.) The aggravating circumstance the jury unanimously found beyond a reasonable doubt was aggravated rape. (Vol. XXXVIII R. p. 9403.)

The trial court denied defendant's motion for a new trial on December 10, 2004. On that same date, the trial court sentenced defendant to death by lethal injection. Defendant directly appealed to the Louisiana Supreme Court. He asserted thirty-one assignments of error: (1) defendant's DNA was obtained in violation of his Fourth Amendment right to be free from unreasonable searches and seizures and also as set forth in Louisiana's Constitution Article 1, Section 5; (2 and 3) the trial court incorrectly denied defendant's motion for change of venue; (4, 5, and 6) the trial court incorrectly denied challenges for cause during voir dire; (7 and 8) the trial court incorrectly excused jurors during voir dire; (9, 10, and 11) the trial court's admission of other crimes evidence violated defendant's rights to due process, a fair trial, and humane and proportionate punishment; (12) the trial court's rulings on funding issues deprived defendant of a fair trial, effective assistance of counsel, the right to present a defense, and humane and proportionate punishment; (13) the jury's decision on defendant's mental retardation and the death sentence are contrary to the evidence and thus violate the Eighth Amendment and Article 1, Section 20 of the Louisiana Constitution; (14) defendant's constitutional rights

were violated by the trial court's refusal to permit the defense to present surrebuttal evidence regarding defendant's mental retardation claim; (15) La. Code Crim. P. art. 905.5.1 violates the Eighth Amendment; (16 and 17) the penalty phase verdict form on mental retardation and jury instructions violated defendant's constitutional rights; (18) defendant's state and federal constitutional rights were violated by the trial court's penalty phase instructions regarding intellectual impairment; (19) the penalty phase verdict form prescribed by La. Code Crim. P. art. 905.7 violates defendant's federal and state constitutional rights to fair and proportionate punishment; (20) defendant's state and federal constitutional rights were violated by the prosecutor's allegedly improper and inflammatory statements; (21) allotment of cases in the 19th Judicial District Court in Louisiana violated due process; (22) the short-form indictment violated defendant's state and federal constitutional rights; (23) the trial court erred in qualifying the state's "fracture match" expert Mark Kurowsky; (24) the trial court erred in qualifying the state's DNA experts; (25) the trial court erred in allowing the state's DNA experts to testify on the ultimate issue in the case; (26) the trial court improperly curtailed defendant's cross-examination; (27) the trial court erred in sustaining the state's objection to a question posed to defendant's sister as to why she believed defendant should not be executed; (28) irregularities in the assembly of the jury venire violated defendant's state and federal constitutional rights; (29) the trial court allowed violation of the rule of sequestration by

allowing family members of the victims of other crimes to remain in the courtroom regardless of whether they were also to serve as witnesses; (30) the trial court erred in denying the motion to suppress the photographic lineup shown to Diane Alexander; (31) the trial court's commutation instruction violated defendant's right to due process and a reliable and proportionate sentence under the state and federal constitutions; and (32) the appellate record is incomplete. The Louisiana Supreme Court upheld defendant's conviction and sentence. *State v. Lee*, 05-2098 (La. 1/16/08), 976 So.2d 109, *rehearing denied* 07-1288 (La. 3/7/08), 977 So.2d 896.

Defendant has presently filed a writ application with this Honorable Court from his direct appeal in state court. He contends this court should grant certiorari (1) to resolve issues surrounding the scope of the inevitable discovery exception to the exclusionary rule and its application to the present case, wherein DNA evidence was taken from defendant, and (2) to address the subject of venue due to pretrial publicity. The state maintains the Louisiana Supreme Court correctly decided these issues; therefore, relief to defendant should be denied.

STATEMENT OF THE FACTS

On May 31, 2002, at approximately 2:00 p.m., Rebecca Yeager found her roommate Charlotte Murray Pace brutally murdered in their Sharlo

Avenue apartment in Baton Rouge. Murray was a beautiful twenty-two year old who had just received her MBA from LSU. She planned to continue her employment at LSU during the summer before beginning her new career in Atlanta that fall.

Upon finding Murray's body, Rebecca telephoned 911, and homicide detectives and crime scene personnel were dispatched to the scene. There was no sign of forced entry, and Murray's telephone and part of her iron were missing. Crime scene personnel documented blood spatters beginning in the den, continuing through the hallway and into the bathroom and Rebecca Yeager's bedroom, where Murray's body was found. There was a tremendous amount of blood in Rebecca's bedroom on the walls, the bed, and around Murray's body. Her body was found lying on the floor next to the bed. She was completely nude from the waist down, and her blouse and bra were pulled up above her breasts. She had been stabbed eighty-one times. She had a gaping hole in her neck and had been bludgeoned with an iron.

Crime scene specialists took DNA swabs from Murray's body at the scene and bagged her hands to protect them from contaminates in order to preserve the evidence. Later her body was transported to the coroner's office, where the forensic pathologist collected evidence for the rape kit and clipped and submitted Murray's fingernails.

The police interviewed witnesses but had few leads in this matter. On July 3, 2002, Julia Naylor,

the State Police DNA analyst that worked this case, obtained a complete DNA profile from a swab taken from Murray's left buttock. She also found the same profile mixed with the victim's profile on the cervical swab taken in the rape kit. Lastly at a later point in time, Reliagene performed Y-STR DNA analysis on the fingernail clippings from Murray and obtained a profile. Although police had the genetic identity of the murderer as early as July 3, 2002, his DNA profile was not in the CODIS system; therefore, authorities were unable to put a face on the profile.

Angela Ross, another Louisiana State Police DNA analyst, had been previously assigned to test DNA evidence from the September 23, 2001, murder of Gina Green. On July 8, 2002, Angela Ross and Julia Naylor were on a break at work, and the subject arose of these two murders. One of their colleagues suggested that they compare the DNA profiles from each murder. They found the profiles to be identical.

Gina Green was an attractive, successful forty-one-year-old nurse. She was found raped and strangled in her Stanford Avenue residence in Baton Rouge. Just as in Murray's case, there were no signs of forced entry. Crime scene personnel secured the blouse Gina had been wearing and submitted it for DNA analysis.

Additionally, the murderer had removed certain items from Gina's home including her cell phone, the shorts she was wearing when she was attacked, a dish towel, and her purse. Police officers recovered

these items dumped behind a warehouse on Choctaw Street in Baton Rouge. A complete profile was obtained by Angela Ross from a spot of blood discovered on Gina's blouse. Ross also obtained a consistent profile from the kitchen towel and a mixture of DNA on the shorts containing a profile consistent with the profile found on the other items.

On July 9, 2002, Diane Alexander, a nursing student in Breaux Bridge, Louisiana was attacked. Ms. Alexander was home getting ready for work when a stranger, who identified himself as Anthony, appeared at the door to her mobile home and requested help to find the Montgomery's residence. When Ms. Alexander indicated that she did not know the Montgomerys, he asked to use the telephone, and she took it to him. He then asked her if her husband might know the man that he was seeking. When Diane responded that her husband was not home, the stranger's demeanor changed, and he forced his way into her trailer. He attempted to rape her but could not sustain an erection. He bludgeoned her and attempted to strangle her with a telephone cord. As Diane faded in and out of consciousness, her son Herman arrived at the residence. Upon hearing the car approach on the gravel driveway, the attacker ran out of the back door. Herman noticed the unfamiliar car parked at the trailer. He described it as a gold Mitsubishi Eclipse with a "Hampton has it" license plate. He also saw a phone cord hanging from the window. Herman found his mother lying in a pool of blood. She had a skull fracture and was rushed to the

hospital where she spent five days. The attacker took certain items from the house, including the handset from the phone, Diane's panties, and a piece of telephone cord. Diane Alexander gave a detailed description of her attacker and aided law enforcement in preparing a composite sketch. Unfortunately, since this Breaux Bridge attack occurred in a separate jurisdiction from the Baton Rouge murders, no connection was initially made by law enforcement between Diane Alexander's attack to the murders of Charlotte Murray Pace and Gina Green.

Just three days after Diane Alexander was attacked, Pam Kinamore, an attractive, successful forty-four-year-old antique shop owner was murdered. Pam's husband, Byron, arrived at their Briarwood Place home in Baton Rouge about 11:45 p.m. on July 12, 2002. Byron found a bathtub full of water in the bathroom, spots of blood on a rug in their bedroom, and a minor disturbance of the furnishings in the room. Pam was gone. Three days later, Pam Kinamore's maggot-infested body was found dumped in the woods off the Whiskey Bay exit of Interstate 10. An autopsy revealed that Pam had been stabbed and her throat slit. A rape kit was performed, and a DNA profile was obtained from the vaginal swab. Although the profile was not absolutely complete due to degeneration at some locations, it was extensive enough to genetically identify Pam's attacker as the same person who murdered Murray and Gina.

Authorities in Baton Rouge at this time recognized and acknowledged that a serial killer was

responsible for these murders. The Serial Killer Task Force was formed, and law enforcement began a massive search to identify the person whose genetic profile they obtained in all three murder cases.

On November 21, 2002, Trenisha Dené Colomb, a twenty-three-year-old attractive young woman disappeared from Lafayette. She last spoke to her father on November 21, 2002, and her car with her purse and keys were found in Grand Coteau near her mother's grave. Three days later, a hunter found Dené Colomb's body in the woods off Renaud Road in Scott, Louisiana. Dené was wearing only a t-shirt and bra and muddy socks and shoes. The forensic pathologist found that she died due to blunt force trauma to her head. A rape kit was taken, and the DNA analyst with the Acadiana Crime Lab obtained a profile from the vaginal swab that was a complete match to the profiles in the three previous murders.

Finally on March 3, 2003, Carrie Yoder, a twenty-six-year-old graduate student at LSU disappeared from her home near campus. There was no indication of a struggle in the residence other than a key holder that was askew, a broken necklace, and a small amount of blood on her purse. Authorities, family, and friends searched for Carrie until her body was found dumped at Whiskey Bay and partially submerged in water. The forensic pathologist determined that she was strangled, beaten, and stomped. A rape kit was taken, and a complete profile was obtained from the vaginal washings. Consistent but less clear profiles were obtained from the vaginal and cervical swabs.

The DNA profiles from this evidence matched the profiles obtained in the four other murders.

The investigation continued and hundreds of DNA swabs were submitted by various police agencies. On May 5, 2003, the Zachary Police Department and the Attorney General's Office worked in concert to obtain an article 66 subpoena for the DNA swab of Derrick Todd Lee. They submitted the swab for analysis, which was completed on May 25, 2003. In the meantime, on May 22, 2003, authorities connected Diane Alexander's case to the five murder cases and held a news conference to broadcast the composite sketch prepared by Diane. They began to receive phone calls identifying the sketch. On May 25, 2003, Natasha Poe completed the DNA analysis of the swab of Derrick Todd Lee and finally identified by name the genetic profile of the serial killer. Defendant's name was not released immediately because authorities wanted to apprehend him first. Prior to releasing the serial killer's identity, authorities sent Diane Alexander a photographic line-up including the picture of Derrick Todd Lee, and she immediately picked him out as the individual who attacked her.

The identity of the serial killer was released on May 26, 2003, and thereafter Derrick Todd Lee was located and arrested in Atlanta, Georgia. Pursuant to the court order, blood was drawn from defendant for DNA testing. In order to confirm prior testing, all the scientists re-ran their tests. The scientists individually confirmed that the profile from Derrick Todd Lee matched the profile on the evidence each evaluated.

The scientists testified at trial that the likelihood of randomly finding another individual other than defendant having the same genetic profile that was obtained from each piece of evidence containing a complete genetic profile is 1 in 3.6 quadrillion.

ARGUMENT

I. THE RULING OF THE LOUISIANA SUPREME COURT COMPORTS WITH THIS COURT'S RULINGS REGARDING THE INEVITABLE DISCOVERY DOCTRINE.

In defendant's first issue he presents to this court for review, he contends the Louisiana Supreme Court erred in allowing defendant's DNA evidence admissible at trial and asserts that the inevitable discovery doctrine is inapplicable to the present case. The state maintains that the result reached by the state court was proper and should be upheld on review.

In state court, the prosecution argued that the subpoena duces tecum obtained by the Attorney General's Office was a proper method for obtaining defendant's DNA profile, and also that although not labeled as a warrant, the subpoena duces tecum contained all the safeguards that a warrant would have afforded defendant. These arguments were rejected by the state's supreme court, and the state's third argument in the alternative was adopted: namely, that the DNA profile obtained by the subpoena duces tecum would have been obtained from

an independent source or discovered by inevitable discovery. Without conceding the merit of the state's first two theories, the prosecution submits that the Louisiana Supreme Court's decision was proper.

In *Nix v. Williams,* 467 U.S. 431, 443, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984), the United States Supreme Court discussed the inevitable discovery doctrine. In *Nix,* the court considered the question of exclusion or suppression of evidence in the context of a search for a missing girl in Iowa. More than 200 volunteers were searching for the missing girl. Searchers focused their search on an area that was several miles wide on both sides of Interstate 80. They were instructed to search all abandoned farm buildings, ditches, culverts, and any other place where the body of a small child could be hidden. During the course of the search, the defendant surrendered to police and was arraigned. Police assured his counsel that he would not be questioned as he was transported from Davenport to Des Moines. During the trip, police initiated conversation with the defendant, who ultimately told the police where the girl's body was located. When the search was halted for the day, search teams were within two and one-half miles of where the girl's body was located next to a culvert in a ditch beside a road two miles south of Interstate 80 in an area searchers planned to canvass.

Ultimately, the defendant was convicted of first-degree murder. His conviction was affirmed by the Iowa Supreme Court. Then, he sought federal habeas review of his conviction. The federal district court

concluded that the evidence had been wrongly admitted, and a divided court of appeals agreed. The supreme court granted certiorari, ruling that the defendant's statements could not be used against him but noted that the location of the body might be admissible in a second trial. At his second trial, the court admitted the evidence related to the body, indicating that the body would have been found "within a short time" had the search not been suspended. The defendant was again convicted, and his appeal was rejected. He sought federal habeas review again. This time, the federal district court agreed with the state courts, but the eighth circuit reversed. The supreme court granted the state's petition for certiorari.

The court described the independent source doctrine, as follows:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse,* position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Nix v. Williams, 467 U.S. at 443, 104 S.Ct. at 2509. This language has been quoted in subsequent United

States Supreme Court cases, such as *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). The court noted that "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." *Nix*, 467 U.S. at 446, 104 S.Ct. at 2510. Thus, the court ruled that the evidence, i.e., the murdered girl's body and evidence related thereto, was admissible.

In *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988), the United States Supreme Court explained the independent source doctrine. In that case, the court noted that officers had illegally entered a building and observed contraband. Withdrawing, the officers sought to obtain a search warrant based on the knowledge they possessed prior to entry into the building without informing the magistrate that they had entered the building or that they saw contraband inside the building. The court held that no suppression was necessary where the later search was conducted with a warrant that was obtained wholly independent of the illegal entry. The reasoning of the court is instructive as to the history of the doctrine and its scope. The court quoted the above-cited quotation from *Nix* as its explanation of the doctrine. The court explained that the inevitable discovery doctrine is, in fact, an extrapolation of the independent source doctrine. *Murray*, 487 U.S. at 539, 108 S.Ct. 2534. The court stressed that the exclusionary rule should not punish police officers who seek to obtain warrants

by utilizing the exclusionary rule. The court noted that the purpose of the exclusionary rule is to punish police misconduct. However, the court noted:

> To apply what we have said to the present cases: Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply. Invoking the exclusionary rule would put the police (and society) not in the same position they would have occupied if no violation occurred, but in a *worse* one. *See Nix v. Williams*, 467 U.S., at 443, 104 S.Ct., at 2508.

Murray, 487 U.S. at 541, 108 S.Ct. 2535. The court also noted:

> The independent source doctrine does not rest upon such metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied.

Murray, 487 U.S. at 542, 108 S.Ct. 2535.

The import of these holdings is that no purpose is served by suppressing evidence pursuant to the exclusionary rule (which supposedly punishes bad conduct by the police) when that evidence would have been discovered in any event or when it could be

discovered by independent means. In the instant case, defendant is essentially seeking to suppress evidence in the form of the DNA characteristics that are special and unique to each individual. The record in this case amply notes that a serial killer had committed multiple murders and rapes, and at least one attempted murder and rape, in south Louisiana. DNA evidence was available to connect the crimes to each other. Police knew they were searching for one individual and had activated a multi-jurisdiction task force to seek evidence, follow leads, and where necessary to obtain DNA swabs from suspects. In addition, other agencies were reviewing any and all unsolved murder cases in an attempt to connect those cases to the serial killer investigation.

The quality and the quantity of evidence available to police officials, including the Serial Killer Task Force, Zachary Police Department, West Feliciana Parish Sheriff's Department, the Attorney General's Office, and St. Martin Parish Sheriff's Office was such that each agency came to regard defendant as a suspect. When the officials from the Attorney General's Office and Zachary Police Department sought to obtain defendant's DNA profile, they were the first to seek judicial authority, but they certainly would not have been the last.

Defendant's DNA was collected for purposes of investigating the Randi Mebruer murder case in Zachary, Louisiana. Detective Todd Morris testified at trial. On May 5, 2003, he testified he was employed as an investigator with the Attorney General's Office.

(Vol. XXXIV R. p. 8262; 10/6/04, tr. p. 26.) At that time, he was not a member of the Serial Killer Task Force, nor was he investigating the murders of Charlotte Murray Pace, Gina Green, Pam Kinamore, Dené Colomb, or Carrie Yoder. (Vol. XXXIV R. p. 8265; 10/6/04, tr. p. 29.) Detective Morris explained that the Attorney General's Office had been conducting an investigation regarding the homicide of Connie Warner and the homicide, missing body, and remains of Randi Mebruer. (Vol. XXXIV R. p. 8266; 10/6/04, tr. p. 30.) Because of these two cases, Detective Morris assisted in getting the subpoena duces tecum for defendant's DNA, and he was present when defendant's DNA was collected. (Vol. XXXIV R. pp. 30-32; 10/6/04 tr. pp. 8266-68.)

Attorney General's Investigator Dannie Mixon also testified he was not a member of the Serial Killer Task Force. Instead, he stated he obtained the subpoena duces tecum and collected defendant's DNA in connection with the Warner and Mebruer investigations. (Vol. XXXIV R. pp. 8282-83; 10/6/04, tr. pp. 46-47.)

Sergeant Ray Day, employed with the Zachary Police Department, testified that he took custody of the buccal swabs once they were collected from defendant. (Vol. XXXIV R. p. 8290; 10/6/04, tr. p. 54.) Sgt. Day stated that he turned the evidence over to the Louisiana State Police Crime Lab the following day, May 6, 2003. (XXXIV R. p. 8292; 10/6/04, tr. p. 56.) He stated that "[a]t the time I requested that I was turning this evidence in for testing in regards to

my Randi Mebruer case, but it could be cross-referenced to the other cases that were being investigated." (Vol. XXXIV R. p. 8294; 10/6/04, tr. p. 58.) He reiterated on cross-examination: "I told her [Michelle Woodham Vara at the Louisiana State Police Crime Lab] the reason I was logging my evidence in was based on a Zachary case, and that if they felt the need to cross-reference it, they could."

Sgt. Day's testimony in this regard was corroborated by the crime lab evidence technician, Michelle Woodham Vara. She verified that defendant's DNA evidence was submitted to the lab for testing in the Mebruer case but was cross-referenced to the cases involving the Serial Killer Task Force. (Vol. XXXIV R. pp. 8300-01; 10/6/04, tr. pp. 64-65.)

The reason that defendant's DNA was collected was made clear on the record at trial. Defendant's DNA was submitted to the crime lab in reference to the Randi Mebruer case in Zachary and cross-referenced to the cases involving the serial killer.

At the hearings on the motion to suppress, the state adequately established that defendant was about to undergo heavy scrutiny as a suspect and that, had it not been for the DNA test results confirming that he was the serial killer, other agencies would have sought and obtained judicial approval to obtain defendant's DNA.

Detective David Smith, one of the task force's team leaders, testified that each team was assigned leads to follow-up. Each lead was pursued until it was

satisfactorily disposed of, either by alibi, DNA, work records, or some other means by which the team could determine that the suspect named in the lead could not be the perpetrator. (Vol. XXI R. p. 5109; 4/22/04, tr. p. 30.) Detective Smith indicated that the first lead on defendant came on September 4, 2002. This lead was assigned to Shane Evans, but was "closed" when the task force focused its efforts on white males driving white trucks. (Vol. XXI R. pp. 5111-12, 5128; 4/22/04, tr. pp. 32-33, 49.)

The lead was later reopened by the task force on March 21, 2003, based on a fax received from the West Feliciana Sheriff's Office naming five possible suspects for the Serial Killer Task Force to consider, including the name of Derrick Todd Lee. At the time of the lead, the task force had begun to consider black males as viable suspects based on statements made by witnesses in the Carrie Yoder investigation. This "new" lead was assigned to Livingston Alfred, who went to defendant's home, but he was not present. Alfred discussed the matter with West Feliciana deputies who indicated that they knew defendant and would contact Alfred when they found him. (Vol. XXI R. pp. 5101-02, 5107, 5113-15; 4/22/04, tr. pp. 22-23, 28, 34-36.) Detective Smith indicated that, had the Attorney General's Office not obtained the DNA swab from defendant, the task force would have continued to investigate defendant. (Vol. XXI R. p. 5116; 4/22/04, tr. p. 37.) Detective Smith also described the procedures the task force employed to obtain DNA swabs. First, they would attempt to get

the suspect to consent or to provide a viable and provable alibi. If a suspect refused, Detective Smith indicated that the "entire team would be dedicated to resolving that lead in one way or another." This would include surveillance of the person, court orders to obtain background information, and trying to establish probable cause. If they could not get a court order, the task force would continue the surveillance and obtain DNA by surreptitious means. Detective Smith indicated other means for obtaining DNA from suspects was to obtain it from cigarette butts, Coke cans, and food left in trash containers. Detective Smith indicated that the task force was able to obtain DNA in "several cases" using such surreptitious means. (Vol. XXI R. pp. 5117-18; 4/22/04, tr. pp. 38-39.) Again, he indicated that the task force would have pursued the lead it had on defendant utilizing the described methods until his name was cleared or they obtained a DNA match.

Corporal Mary Ann Godawa, spokesperson for the task force, testified and revealed how the tenor of the investigation changed suddenly and dramatically. She indicated that a poster or flyer had been released by the task force in conjunction with the Lafayette Parish and St. Martin Parish Sheriff's Offices. The poster had a composite drawing of the suspect in the attempted rape and attempted murder of Diane Alexander, the only known living victim of the serial killer, and a description of the vehicle the suspect was driving. The task force held a press conference and released the information to the public because they

believed the serial killer was the person depicted by the Alexander composite. (Vol. XXI R. p. 5140; 4/22/04, tr. p. 61.)

Although defendant had been swabbed on May 5, 2003, the results of this procedure had not been determined as of May 23, 2003. The results were released to the task force on the evening of May 25, 2003. (Vol. XXI R. pp. 5141-42; 4/22/04, tr. pp. 62-63.)

Detective Darryl Rice, who was the Assistant Commander of the Command Post and the Chief Logistics Officer for the task force, testified regarding the tip line and procedures that were employed in relation to incoming tips. Detective Rice described various tips that the task force received immediately following the release of the composite drawing.

The first of these new tips came in at 2:24 p.m. on the day of the release of the composite. The caller indicated:

> Thinks she knows the person because of the description of the car, a gold Mirage. He was a peeping tom before. She thinks his name is Todd Lee. He is from St. Francisville. He is always in and out of jail. His wife had a type of car [ ] they are describing. Not long ago he was charged with a crime similar to breaking in. Call her if you need more information.

(Vol. XXI R. p. 5149; 4/22/04, tr. p. 70.) This lead was not followed up prior to defendant's arrest on May 27, 2003.

A second tip was received on May 23, 2003, at about 6:16 p.m. An e-mail to the task force indicated as follows:

> The caller stated in the narrative: Caller works for a local sheriff's office. He knows someone that has a past criminal history for stalking women from the St. Francisville area. His name is Derrick Lee, about 5'10". The suspect made the comment that he had killed a woman he was dating before. The suspect fits the sketch. He's light-complected, black male. He had a small gold car at one time. He keeps himself up really clean, keeps his hair short, thin mustache and he has a muscular build.

(Vol. XXI R. p. 5151; 4/22/04, tr. p. 72.)

Another tip was received on May 24, 2003, at 5:41 p.m., again by e-mail. That tip was described as follows:

> The event narrative here was he was looking at the picture of the man on the front page of *The Advocate*. His name is Derrick Lee and he lives in St. Francisville. He has a history of being a peeping tom and was the prime suspect in a double homicide in Zachary. Randy Metz with the West Feliciana Sheriff's Department can tell you more about the case.

(Vol. XXI R. p. 5152; 4/22/04, tr. p. 73.)

Finally, testimony indicates that a fourth tip came in to the task force on May 24, 2003, and indicated the following:

> The event narrative here is calling to report a man that fits the description of serial killer. This man has a gold Mirage that is wrecked in the front, and the man that tried to rape a woman in Breaux Bridge had a gold Mirage that was wrecked in the front too. He is the exact same man in today's paper except that his lips need to be a little bit bigger. His name is Derrick Todd Lee and he used to live on Highway 61 right after you pass the truck stop called Southern Belle. The car is parked in front of his mother's house in St. Francisville on Blackmore Road. His whole family lives in that area and he never moved out of the house but just disappeared with wife and kids.

(Vol. XX R. p. 5153; 4/22/04, tr. p. 74.)

From the foregoing, it should be clear that the dragnet was closing in on Derrick Todd Lee. Various agencies were pursuing him as a suspect, and more leads were coming in every day. Once the task force focused on him as a suspect and more narrowly focused its investigation, it was inevitable that it would have obtained his DNA, either by obtaining his consent, obtaining a search warrant, or by obtaining it surreptitiously.

In the instant case, the many governmental agencies who were pursuing leads that invariably

converged on defendant should not be punished by the exclusion of DNA evidence that was obtained by another agency, especially where the other governmental agency obtained judicial approval for the seizure of DNA. As noted by the court in *Murray* and *Nix*, the state agencies should not be placed in a worse position than had they not sought judicial approval. Likewise, no interest of society is served, and, in fact, the integrity of the entire judicial process is called into question when a court suppresses evidence as defendant requested.

The Louisiana Supreme Court's analysis under this Honorable Court's inevitable discovery doctrine was correct. The state supreme court opined as follows:

> One of the theories courts use in addressing "fruit of the poisonous tree" issues is the inevitable discovery rule. The inevitable discovery doctrine "is in reality an extrapolation from the independent source doctrine: Because the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." *Murray v. United States,* 487 U.S. 533, 539, 108 S.Ct. 2529, 2534, 101 L.Ed.2d 472 (1988). A functional similarity exists between the independent source and inevitable discovery doctrines because both seek to avoid excluding evidence the police "would have obtained . . . if no misconduct had taken place." *Nix v. Williams,* 467 U.S. 431, 444,

104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984). The State therefore bears the burden of proving by a preponderance of the evidence that "the information ultimately or inevitably would have been discovered by lawful means. . . ." *Id.*; *State v. Vigne,* 01-2940 (La.6/21/02), 820 So.2d 533, 539. Application of the inevitable discovery doctrine thus "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment. . . ." *Nix v. Williams,* 467 U.S. at 444, 104 S.Ct. at 2509 n. 5; *State v. Vigne,* 820 So.2d at 539.

Integral to the proper application of the inevitable discovery doctrine is a finding that law enforcement *would* have inevitably secured the evidence by lawful means, not simply that they *could* have. Thus, a mere showing that the police had probable cause for a search and could have secured a warrant from a neutral magistrate does not satisfy the doctrine, because it would effectively obviate the Fourth Amendment preference for warrants and reduce the exclusionary rule to cases in which the police lack probable cause. *See United States v. Elder,* 466 F.3d 1090, 1091 (7th Cir.2006) ("The usual understanding of that doctrine is that the exclusionary rule should not be applied when all the steps required to obtain a valid warrant have been taken before the premature search occurs [citing *Murray v. United States,* 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988)]. . . . If probable cause alone – without putting in train the process

> of applying for a warrant – were enough to invoke the inevitable-discovery doctrine, that would have the same effect as limiting the exclusionary rule to searches conducted without probable cause."); *see also* 6 LaFave, *Search and Seizure,* § 11.4, at 278-79 (Fourth Ed.) ("Circumstances justifying application of the 'inevitable discovery' rule are most likely to be present if these [independent] investigative procedures were already in progress prior to the discovery via illegal means, as in *Nix v. Williams,* or where the circumstances are such that, pursuant to some standardized procedures or established routine a certain evidence-revealing event would definitely have occurred later.").

Lee, 05-2098 at pp. 22-24, 976 So.2d at pp. 127-28.

The state supreme court then detailed the facts of the present case as applied to the federal standard. The court denoted that two separate lines of criminal investigations involving defendant were ongoing before the issuance of the subpoena duces tecum in this case. Even though one of defendant's leads was "closed" by the police, the state court explained how and when a new tip refocused attention on defendant's activities. The state court further explained:

> Even though this evidence demonstrates "historical facts capable of ready verification or impeachment" as enunciated in *Nix,* we need not rest our resolution of the inevitable discovery rule on these facts alone. As the chronology of events unfolded, it is important

> to remember that although defendant's buccal swabbings were obtained on May 3, 2003, Natasha Poe, the analyst in the State Police Crime Lab who examined the swabbings, testified at trial that she did not begin her analysis until May 20 because she was out of town, and did not conclude her testing until May 23, 2003. She then reported her findings immediately to her superior who evidently did not convey them to the Task Force until May 25, 2003.

Lee, 05-2098 at p. 27, 976 So.2d at p. 129.

The court next detailed how the hunt for the killer intensified with the release of the composite drawing as described by Ms. Alexander and the description of the attacker's car as seen by Ms. Alexander's son. The release of this new information quickly brought about four more tips leading directly to defendant.

The Louisiana Supreme Court properly concluded:

> Considering the historical facts that are verifiable, we find the State satisfied its burden of showing by a preponderance of the evidence there was a parallel and independent investigation unrelated to the illegal search that would have inevitably and legally yielded defendant's DNA. When viewed in light of the Task Force's receipt of four rapid-fire tips identifying defendant by name and make of car after the release of the sketch of the serial killer, it is apparent

defendant's apprehension was no longer an object of pure speculation, but rather a matter of imminent reality. The tips various citizens called in provided probable cause to arrest defendant as Alexander's assailant. Through the pursuit of this entirely independent investigation based on information entirely untainted by the prior collection of defendant's DNA sample, it is evident the police *would* have arrested the defendant and *would* have secured a DNA sample. Thus, the State has shown: (1) there is a reasonable probability the contested evidence would have been discovered by lawful means in the absence of police misconduct; and (2) law enforcement was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation. *See e.g., United States v. Lamas,* 930 F.2d 1099, 1102 (5th Cir.1991); *United States v. Cherry,* 759 F.2d 1196, 1205-1206 (5th Cir.1985); *cf. United States v. James,* 353 F.3d 606, 616 (8th Cir.2003) (no proof of inevitable discovery given absence of evidence that there was actual, alternative investigation which would have led to discovery of evidence); *United States v. Procopio,* 88 F.3d 21, 27 (1st Cir.1996) (inevitable discovery exception applicable when local police would have certainly contacted local agents and secured a warrant on their own); *United States v. Drosten,* 819 F.2d 1067, 1071 (11th Cir.1987) (inevitable discovery exception applicable when evidence indicated police knew witness's telephone number and were actively pursuing

> evidence of his name through lawful avenue of discovery when illegal search revealing name occurred); *Davis v. Georgia,* 262 Ga. 578, 583, 422 S.E.2d 546, 551 (1992) (no inevitable discovery found where the State did not show a standard procedure where warrant would have been sought following 10-year-old child's telephone call stating that drugs were in house).

Lee, 05-2098 at pp. 29-30, 976 So.2d at p. 131.

The trial court protected defendant's constitutional rights by meticulously proceeding through the various legal arguments that were pertinent in this case. A review of the record reveals that the trial court committed no error in ruling on defendant's motion to suppress, and the ultimate decision of the Louisiana Supreme Court was correct. Relief should be denied.

II. THE LOUISIANA SUPREME COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR A CHANGE OF VENUE BASED ON PRETRIAL PUBLICITY; DEFENDANT RECEIVED A FAIR TRIAL BY AN IMPARTIAL JURY.

Defendant claims the trial court erred in not granting defendant's motion for a change of venue and that he was denied a fair trial by an impartial jury due to the trial court's decision. The state submits that under the circumstances of the present

case, no error was made, and the decision of the state's supreme court should be upheld.

The Louisiana Supreme Court in its opinion correctly delineated the standard applied by this Honorable Court as follows:

> The constitutional standard of fairness requires a defendant have a panel of impartial, indifferent jurors. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). To hold the mere existence of any preconceived notion about the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), citing *Irvin v. Dowd*, 366 U.S. at 723, 81 S.Ct. at 1642. "At the same time, the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." *Id.*

Lee, 05-2098 at p. 37, n. 12, 976 So.2d at p. 135.

In Louisiana, La. Code Crim. P. art. 621 sets forth the time for filing a motion for a change of venue, the contents of such a motion, and the fact

that a contradictory hearing shall be held upon the motion. Grounds for a change of venue are found in La. Code Crim. P. art. 622.

The Louisiana Supreme Court analyzed in detail the issue of pretrial publicity in this case. Considerations included in the analysis were the nature of pretrial publicity, the comments of government officials, the length of time between comments and the trial, the severity and notoriety of the offense, the areas from which the jury was drawn, other community events that either affect or reflect the community attitude toward defendant, and factors that likely affect the candor and veracity of prospective jurors. The state supreme court correctly concluded "[a]fter carefully reviewing the record of this matter, defendant failed to show the trial court abused its discretion in denying his motion for a change of venue." *Lee*, 05-2098 at p. 40, 976 So.2d at p. 137.

Defendant in his application to this court cites the case of *Leonard v. United States*, 378 U.S. 544, 84 S.Ct. 1696, 12 L.Ed.2d 1028 (1964), as being a case similar to the present matter. *Leonard*, however, is a per curiam decision which holds that prospective jurors cannot serve on a defendant's second successive jury if those prospective jurors were present in open court and heard the guilty verdict pronouncement in the prosecution of that same defendant in his first trial. In *Leonard*, the second jury that found the defendant guilty actually contained five jurors who were physically present during the reading of the first

trial's guilty verdict. *Leonard*'s facts are entirely distinguishable from those of the instant case.

Defendant in the present case filed his original motion for a change of venue on July 17, 2003. (Vol. I R. pp. 193-95.) The state's answer was filed on August 13, 2003. (Vol. II R. pp. 382-85.) In that motion the state asserted that a change of venue based on pre-trial publicity was unjustified

> in light of the fact that East Baton Rouge Parish (which is the Nineteenth Judicial District), by the 2000 census has a population of approximately 412,000, which makes it the third largest parish in the state by population, which provides a mass for an expanded jury venire. East Baton Rouge Parish has a history of high profile murder cases and experience has proven that even in a media saturated case, a fair and impartial jury can be selected by the Voir Dire process available to the court, state and defense which provides for exclusion of jurors who have formed a fixed opinion in advance of trial.
>
> While the defendant claims statements made to the media by District Attorney Doug Moreau, First Assistant District Attorney John W. Sinquefield and law enforcement officials have added to the publicity, he fails to mention that neither Moreau nor Sinquefield have discussed any evidence in the case or made any statements other then general comments on procedure and court proceedings. Defendant failed to note in his motion that Mr. Mike Mitchell, his lead counsel, has

> been quite prominent in the media, along with persons associated and/or aligned with the defense, making statements favorable to the defendant and his defenses. He also fails to mention that Assistant Public Defender Bruce Ungast [sic] actually made a statement which was televised, to the effect that local jurors might be acceptable since the local population is familiar with the (supposed) failings of the Multi-Agency Homicide Task Force, which might work to the favor of the defendant.
>
> It is often months or years between indictment and trial of a capital murder case, thus, defendant's motion is premature at this time and should be deferred until the Voir Dire process and then either granted or denied, depending on the Court's experience of whether or not a fair jury can be obtained ***at the time of the trial***.

(Vol. II R. p. 383.) (Emphasis original.) In-court argument concerning the motion for a change of venue occurred on October 8, 2003, and it was agreed that another date would be set for an additional hearing in the matter. (Vol. XVII R. pp. 4023-24; 10/8/03, tr. pp. 7-8.) Next, defendant filed a motion to continue the venue hearing and an amendment to that motion. (Vol. VI R. pp. 1318-24.) A court appearance was made in connection with the motion. (Vol. XIX R. pp. 4526-63.) A second supplemental motion concerning the motion for a change of venue was filed on February 27, 2004. (Vol. VI R. pp. 1440-42.) A change of venue hearing took place on March 1,

2004. (Vol. XIX-XX R. pp. 4564-4802.) A ruling on the motion was deferred until after the jury was chosen for trial. (Vol. XXXII R. p. 7890; 10/4/04, tr. p. 13.)

Voir dire in this case took place over a period of thirteen days: on September 13, 14, 15, 17, 20, 21, 22, 23, 24, 27, 28, 29, and 30, 2004. Although almost all prospective jurors had heard of defendant or his crime in some manner, the jurors who could not put pretrial publicity out of their minds were excused during the voir dire process. The subject of pretrial publicity was thoroughly discussed with the prospective jurors so that any impartial jurors did not serve. All of the jurors who were picked to serve on defendant's jury assured the trial court that they could decide the case based solely on the evidence presented at trial, that they could put aside any notions of guilt that they may have heard of in the media, and that they would give defendant the presumption of innocence. Jurors at all times were admonished by the trial court not to read or listen to anything in the media concerning defendant's case.

Defendant failed to demonstrate that pretrial publicity in this case denied defendant a fair and impartial trial. The state court's decision was correct and should be upheld on appeal.

CONCLUSION

For the foregoing reasons, the state respectfully requests that this court deny petitioner's application for writ of certiorari.

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